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No. 87-308

In The
Supreme Court of the United States
October Term, 1987

TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS,
Petitioners,

v.

WAYNE J. YAMASAKI, individually, and in his official capacity as the Director of the Department of Transportation of the State of Hawaii, *et al.*,
Respondents.

and

TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS,
Petitioners,

v.

TANY S. HONG, in his official capacity as the Attorney General of the State of Hawaii, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257(3) over petitioners' claims purporting to arise under the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), when those claims (a) were not raised, and indeed were expressly abandoned, in the courts below, and (b) do not depend upon any remotely fair construction of the Admission Act this Court could give?

2. Whether, even if this Court has jurisdiction under § 1257(3), the Admission Act's provisions vesting in the State of Hawaii broad discretion to choose among numerous public purposes, only one of which is bettering "the conditions of Native Hawaiians," confers upon petitioners the right they seek to vindicate here, that is, twenty per cent of "all revenues" from the lands subject to the provisions of § 5(f) of the Act?

3. Whether, even if the foregoing do not bar relief, relief in this Court cannot be had under the Eleventh Amendment?

4. Whether the manner in which the Supreme Court of Hawaii declined to permit petitioners' claims to go forward in the courts of Hawaii on the basis of justiciability principles wholly rooted in state law presents any independent substantial federal question meriting review when

(a) such claims, like petitioners' substantive claims, were not timely raised in the courts below, even though Haw. R. App. P. 40 provided an opportunity for petitioners to present such claims to the Supreme Court of Hawaii;

(b) whether Haw. Rev. Stat. § 10-13.5 (1985) provides sufficient standards to warrant a judicial remedy from the Courts of Hawaii was not only raised in the pleadings in the trial court but briefed extensively on appeal;

(c) the jurisdictional ground upon which the Supreme Court of Hawaii decided this case, by established precedent, could be properly raised at any time in the state court proceedings; and

(d) the state court's decision to await further guidance arises in an area that is wholly a creature of statute, and not common law?*

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* The petitioners before this Court are the Trustees of the Office of Hawaiian Affairs, who are public officials of the State of Hawaii elected pursuant to Chapter 10, Haw. Rev. Stat. (1985). In the courts below, petitioners named the following officials in Civil No. 79260, respondents here, as defendants in their official capacities: Tany S. Hong, Attorney General; Susumo Ono, Chairman of the Board of Land and Natural Resources; and Jensen Hee, Director of Finance. These officials have been succeeded, respectively, by Warren Price, III, William W. Paty, and Yukio Takemoto. Petitioners, in Civil No. 81839, named the Aloha Tower Development Corporation and Attorney General Hong, Finance Director Hee, and Chairman of the Board of Land and Natural Resources Ono, as well as Wayne J. Yamasaki, Director of the Department of Transportation, in both their official and personal capacities. Mr. Yamasaki has been succeeded as Transportation Director by Edward Y. Hirata. All defendants appear in this Court as respondents.

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Respondents Tany Hong, Attorney General of the State of Hawaii, Susumo Ono, Chairman of the Board of Land and Natural Resources of the State of Hawaii, Jenson Hee, Director of Finance of the State of Hawaii, and Wayne J. Yamasaki, Director of the Department of Trans-

portation of the State of Hawaii, together with their successors in office and the Aloha Tower Development Corporation, respondents in this Court, respectfully pray that the Petition for Certiorari to review the judgment of the Supreme Court of Hawaii entered May 27, 1987, be denied.

———o———

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 737 P.2d 446 (Haw. 1987).

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JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on May 27, 1987, and the Petition for Certiorari, invoking 28 U.S.C. § 1257(3) as the basis for review, was timely filed on August 20, 1987. This Court lacks jurisdiction over the instant petition because the federal questions presented were not set up or claimed in the courts below as required by § 1257(3), the federal questions, if any are preserved, are wholly insubstantial, and the relief sought is barred by the Eleventh Amendment.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, paragraph 2 of the United States Constitution provides in relevant part that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 5(f) of Act of March 18, 1959, the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), provides in full that

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Section 1257(3) of Title 28, United States Code, provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y writ of certiorari, where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Sections 4, 5, and 6 of Article XII of the Hawaii Constitution provide, respectively, in relevant part that

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.
>
> There is hereby established an office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians.
>
> The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians . . . .

Section 7 of Article XVI of the Hawaii Constitution provides in relevant part

> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

Section 8 of Article XVIII of the Hawaii Constitution provides in relevant part that

> The legislature shall provide for the implementation of the amendments to Article XII in Sections 5 and 6 on or before the first general election following ratification of the amendments to Article XII in Sections 5 and 6.

Section 10-3(1) of Hawaii Revised Statutes provides in relevant part that

> The purposes of the office of Hawaiian affairs include: (1) the betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes

> Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e)[.]

Section 10-13.5 of Hawaii Revised Statutes provides in relevant part that

> Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter.

Section 171-18 of Hawaii Revised Statutes provides in relevant part that

> All funds derived from the sale or lease or other disposition of public lands shall be appropriated by the laws of the State; provided that all proceeds and income from the sale, lease, or other disposition of lands . . . returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and . . . lands . . . later conveyed to the State under section 5(e) shall be held as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.

Section 261-5 of Hawaii Revised Statutes provides in relevant part that

> All moneys received by the department of transportation from rents, fees and other charges pursuant to this chapter as well as all aviation fuel taxes paid

pursuant to section 243-4(a)(2) shall be paid into the airport revenue fund created by section 248-8. All such moneys paid into the airport revenue fund shall be expended by the department for the statewide system of airports, including the construction of airports and air navigation facilities approved by the legislature, including acquisition of real property and interests therein; and for operation and maintenance of airports and air navigation facilities; and for the payment of indebtedness heretofore or hereafter incurred by the department, or its predecessor, the Hawaii aeronautics commission, for any of the purposes of this chapter.

———o———

STATEMENT OF THE CASE

This case arises out of the delicate interaction among a variety of state constitutional and statutory provisions, with which the courts of Hawaii are uniquely familiar, that reflects efforts by our Executive, Legislature, and Judiciary wisely to exercise the discretion conferred by section 5(f) of the Admission Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959), over what are known as Hawaii's public trust lands.

1. Hawaii's public trust lands, estimated at well over a million acres,[1] were originally transferred to the United

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[1] *See* Legislative Auditor of the State of Hawaii, *Progress Report on the Public Land Trust* 14 (March 1983). The size of the public trust lands, as stated by the Legislative Auditor, is computed by taking the original lands ceded by the Republic of Hawaii, estimated at roughly 1.8 million acres, and substract-

(Continued on next page)

States by the Republic of Hawaii at the time of Hawaii's annexation in 1898, subject to the condition that "existing laws of the United States relative to public lands" would not apply. *See* the Joint Resolution to Provide for annexing the Hawaiian Islands to the United States, Resolution of July 7, 1898, 30 Stat. 750 (1898). In settling the terms of annexation, the United States agreed with the agents of the Republic of Hawaii that "all revenue from or proceeds of [said lands,] except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.*

The presumptive obligations of the United States under the Joint Resolution were confirmed in section 91 of the Organic Act, Act of April 30, 1900, 31 Stat. 141 (1900), which, among other things, granted the Territory authority to "maintain, manage, and care for" the ceded lands not reserved for national purposes by Congress or the President, and required any rents or consideration earned by the United States by disposition of ceded lands to private parties to be turned over to the treasury of the Territory for use in a variety of ways, including for "public works,

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ing acreage set aside, prior to Statehood, by executive orders of the President or Governor of Hawaii for use of the United States, and ceded lands controlled by the United States pursuant to permits, licenses, and permission of the Territory. *Id.* Because of the Act of December 23, 1963, Pub. L. No. 88-233, 77 Stat. 472 (1963), the size of the public land trust increases as the United States releases additional lands under the substantive terms of sections 5(c)-(e) of the Admission Act.

. . . highways, wharves, landings, harbor improvements, public buildings, or other public purposes." *Id.*

Section 5(f) of the Admission Act, 73 Stat. 6, recast the discretion granted Hawaii's local government by the Resolution of Annexation and the Organic Act. Public lands whose title at Statehood was not already in the Territory and to which the State did not succeed under Section 5(a) of the Admission Act, and which were returned under sections 5(b), (c), (d), and (e) of the Act, were left for disposition by the State for "one or more" of five purposes: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; (3) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; and (5) "provision of lands for public use." Congress provided that only a failure to manage and dispose of lands reverting under sections 5(b), (c), (d), and (e) "for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" would be "a breach of trust." The only vehicle Congress authorized for enforcement of the trust was a "suit . . . brought by the United States." Section 5(f), 73 Stat. at 6.

2. Growth of the value of the section 5(f) corpus, fueled by rising real estate prices, tourism, and development, and the broad discretion afforded by Congress, naturally has led to intense debate among those who, in the first instance, frame "the constitution and laws" that give content to the trust—Hawaii's voters and their chosen elected officials. In 1978, Hawaii's constitutional conven-

tion recognized that "the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is [benefiting] native Hawaiians of one-half blood." I *Proceedings of the Constitutional Convention of Hawaii of 1978* 644 (1980) [hereinafter *"Proceedings"*]. The convention thus drafted for the voters what is now Article XII, § 4, of the Hawaii Constitution.

Article XII, § 4 carves out of the general corpus of section 5(f) trust proceeds a distinct subset of beneficial interests—that arising out of "lands granted to the State of Hawaii by Section 5(b) of the Admission Act"—for "native Hawaiians and the general public."[2] The reasons for doing so were largely to promote administrative efficiency and self-determination for native Hawaiians who take the benefit of such 5(f) proceeds as are allocated, as well as other benefits under law, including those under the Hawaiian Homes Commission Act. *See* II *Proceedings* 458 (remarks of Del. Kaapu). The convention did not clearly define what part of the section 5(b) lands were to benefit native Hawaiians, what was to be allocated elsewhere, or whether gross receipts, net receipts, raw land, receipts from "dispositions" (or what a "disposition" would include), or other interests would constitute the corpus to be divided under the new provisions of Article XII. Rather, to fulfill its hopes for native Hawaiian self-determination, the convention created a vehicle for ad-

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[2] The convention retained the 1968 constitution's language authorizing the State to pass legislation to implement any section 5(f) options unimpaired by the special trust created under Article XII, particularly those arising from lands returned to Hawaii under section 5(e) of the Admission Act, which are subject to section 5(f), but not Article XII of the Hawaii Constitution. *See* Haw. Const. art. XVI, § 7.

ministering allocations: an Office of Hawaiian Affairs ("OHA") to "assume the status of a state agency," I *Proceedings* 645; *id.* at 1018, and, "administer the proceeds . . . , including all income and proceeds from that pro rata portion of the trust referred to in section 4 of [article XII]." Haw. Const. art. XII, § 6.

Defining the "pro rata portion" of the Article XII trust was left to our Legislature. As stated by the Committee of the Whole, "the Legislature [can] best handle the further details necessary for the apportionment scheme." I *Proceedings* 1018; *see also* II *Proceedings* 462 (remarks of Del. Waihee) (referring to "the section of these revenues from public lands which are to be given" without acknowledging that any specific portion was allocated). Lest any doubt be left about the Legislature's central political role in apportioning the Article XII lands, the state constitution directed that "[t]he legislature shall provide for the implementation of the amendments to Article XII in Sections 5 and 6 on or before the first general election following ratification of the amendments to Article XII in Sections 5 and 6." Haw. Const. art. XVIII, § 8 (1978).

3. Legislative action to "provide for the implementation of the amendments" occurred on schedule, but raised numerous problems. OHA's enabling statutes, passed in 1979, *see* the Act of June 7, 1979, ch. 196, § 2, 1979 Haw. Sess. L. 398, extended the trust subject to apportionment to "all funds derived from the public land trust," Haw. Rev. Stat. § 10-3, that is, all section 5(f) lands, raising serious questions about the validity of the implementing legislation under Article XII. In addition, while the Leg-

islature in 1980 provided that "[t]wenty per cent of all funds derived from the public land trust [defined in Haw. Rev. Stat. § 10-3 would] be expended by [OHA] for the purposes of [chapter 10, Haw. Rev. Stat.]," Act of June 16, 1980, ch. 273, § 1, 1980 Haw. Sess. L. 525, *codified at* Haw. Rev. Stat. § 10-13.5 (1985), the Legislature retained numerous schemes that conflicted with a literal reading of this requirement, even if it were valid, including the general authority for implementing section 5(f), Haw. Rev. Stat. § 171-18. Thus, although airport revenues derived under Chapter 261, Haw. Rev. Stat., are widely conceded to originate in substantial part from section 5(f) lands, Chapter 261 makes no provision for the distribution of those revenues to OHA. Instead, Chapter 261 mandates that "all such moneys . . . be expended by the [state] for the statewide system of airports." Haw. Rev. Stat. § 261-5. Nor did the 1980 legislation say whether net or gross receipts were to comprise the corpus under Haw. Rev. Stat. § 10-3, or whether revenues from "dispositions" of land—the term used in § 10-3—include such funds as airport and harbor revenues.

In frank recognition of these problems, as well as the enormous difficulty of tracing and clearing title to Hawaii's public trust lands, the Legislature in 1982 commissioned the Hawaii Legislative Auditor "(1) to complete the inventory of, (2) to study the numerous legal and fiscal issues relating to the use of and, (3) to study the use and distribution of revenues from ceded lands." Act of May 26, 1982, ch. 122, § 1, 1982 Haw. Sess. L. 180-81. In his *Final Report on the Public Land Trust* (Dec. 1986) [hereinafter *"Auditor's Final Report"*], the Legislative Auditor concluded that between June 16, 1980, when § 10-

13.5 first went into effect, and June 30, 1986, OHA had received more than $8 million under Hawaii law. *Id.* at 103.

As to claims for more, the Auditor identified issues on which there had been numerous state-law disputes, ranging from claims that the Article XII trust included all section 5(f) lands, not only those returned under section 5(b), to retroactivity issues concerning the time from passage of 1978 constitutional amendments and implementation of Chapter 10, Haw. Rev. Stat. The Auditor also noted that, as a result of the issuance of tax-exempt bonds, literal constructions of Chapter 10 would raise very substantial issues under the Contracts Clause. *See generally Auditor's Final Report* 103-32. The Auditor implicitly recognized OHA had no remedy under these circumstances, urging that controversies over "[w]hat properties in the trust res should constitute the 20 per cent should be subject to negotiations between OHA and the state administration." *Id.* at 131.

4. Before the Legislative Auditor could even complete his recommendations, OHA commenced two related actions against various State officers in the Circuit Court for the First Circuit, State of Hawaii, claiming asserted breaches of the requirements of Haw. Rev. Stat. § 10-13.5. In the first, *Trustees of the Office of Hawaiian Affairs v. Hong,* Civil No. 79260 (Haw. 1st Cir. filed Sept. 7, 1983) ["*Hong*"], OHA moved for a declaratory order entitling OHA to twenty per cent of a settlement reached by the State in litigation with Molokai Ranch. In that settlement, the State had received land valued at about $1.3

million as a result of the Ranch's receipt of payments totalling a like amount for sand that had been mined by another company from land, thought to have been the Ranch's, that was in fact section 5(f) land owned by the State. Complaint, *Hong,* (App. A, *infra*). In the second, *Trustees of the Office of Hawaiian Affairs v. Yamasaki,* Civil No. 81939 (Haw. 1st Cir. filed Mar. 8, 1984) [*"Yamasaki"*], OHA demanded twenty per cent of all revenue from section 5(f) lands, including lands returned under section 5(e), or vested under section 5(a), of the Admission Act, as well as numerous lands encumbered by public bond obligations, *compare* Complaint, *Yamasaki,* at 9-26 (App. B, *infra*), *with Auditor's Final Report, supra,* 103-132. These include lands surrounding harbors on all major islands, on Sand Island on Oahu, where wharves and warehouses stand, in downtown Honolulu, where the Aloha Tower Complex is located, and near Pearl Harbor, where Honolulu International Airport sits.

In the *Hong* action, petitioners waived any contention that their claim arose under the Admission Act, insofar as it was only by virtue of state law that their claim was colorable:

> The State in its motion for judgment on the pleadings suggests, by their reliance on *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n,* 588 F.2d 1216 (9th Cir. 1978), (1) that the complaint in this action was brought pursuant to sec. 5(f) of the Admissions Act; and, therefore, (2) it should be dismissed because only the United States may sue to enforce a breach of the 5(f) trust. Unfortunately the State's argument is [sic] erroneously assumes that this action is based upon sec. 5(f) of the Admissions Act. Not so! This action is based upon the cited [state] constitutional provisions and

> Chapter 10, HRS which provide a set of obligations and rights completely independent from those established by Sec. 5(f) of the Admissions Act.

Memorandum in Opp. to Motion for Judgment On the Pleadings, *Hong, supra* (Haw. 1st Cir. Mar. 15, 1984) (App. C, *infra*) at 5. In *Yamasaki*, petitioners also abanoned any contention that they sought enforcement of section 5(f). Petitioners stated:

> The precise issue presented is whether the State's refusal to give OHA its twenty percent (20%) of all income and proceeds derived from the sale or lease of those lands described in the Complaint, is in violation of Article 12, Sections 4, 5 and 6, and Article 16, Section 7 of the Hawaii State Constitution, and Sections 10-3(1) and 10-13.5 of the Hawaii Revised Statutes.

Memorandum in Opp. to Motion to Dismiss, *Yamasaki* (Haw. 1st Cir. filed Mar. 16, 1984) at 10-11; *see id.* at 23-25 (conceding the correctness of *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216 (9th Cir. 1978)) (App. D, *infra*).

5. After considering and rejecting respondents' claims in both actions that the instant suits were barred by sovereign immunity under the rationale of *Munoz v. Commissioner of Public Lands*, 40 Haw. 675, 687 (1955), and subsequent caselaw, *e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 126, 621 P.2d 957, 965 (1980), by petitioner's lack of standing, by the absence of any cognizable breach of the state-law standards on which petitioners sued, and by other defenses, the Circuit Court entered orders in both cases on February 19, 1986, granting respondents leave to appeal. After all briefs were filed, the Supreme Court of Hawaii on October 21, 1986 ordered the appeals consolidated. The parties briefed sover-

eign immunity, state-law analogues to *Ex parte Young*, 209 U.S. 123 (1908), *e.g.*, *W.H. Greenwell, Ltd. v. Department of Land and Natural Resources*, 50 Haw. 207, 436 P.2d 527 (1968), the sufficiency of Haw. Rev. Stat. § 10--13.5 to support mandamus under the standards set forth in *State v. Shintaku*, 64 Haw. 307, 640 P.2d 289 (1982), and related cases, and, hence, the duties imposed, if any, by the state laws petitioners admitted were the only items in dispute. At no time did petitioners even remotely suggest that the result they sought was required by the Supremacy Clause, or by Section 5(f).

6. On May 27, 1987, the Supreme Court of Hawaii reversed. After reviewing the lengthy history of the Legislature's effort to devise manageable standards for administration of the Article XII trust, the Supreme Court of Hawaii concluded, as a matter of state law, that petitioners had improperly invoked the jurisdiction of the Circuit Courts by asking the Judiciary of Hawaii to intercede in a nonjusticiable political question. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 457-58 (Haw. 1987), Pet. App. 22-27. The Court, in the *Hong* action, found that "nothing in HRS § 10-3, where the public land trust is described," supported petitioners' demands, and that only by usurping legislative power could the Court grant relief. *Id.* at 458; Pet. App. at 25-26. In the *Yamasaki* action, the Court similarly concluded that, *e.g.*, conflicts between Chapter 261, which authorized unlimited use of airport funds "for the state-wide system of airports," and not for OHA, and petitioners' view of Chapter 10, Haw. Rev. Stat., were irreconcilable. Rather than impose its own view on the disputes, the Supreme Court of Hawaii denied present relief to petition-

ers and remanded the issue to the Legislature. 737 P.2d at 458, Pet. App. at 26-27. OHA did not pursue its right to seek reconsideration under Haw. R. App. P. 40 (1986), and filed for review here under 28 U.S.C. § 1257.

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REASONS FOR DENYING THE WRIT

Rather than present any specific reason under this Court's Rule 17 as to why certiorari should be granted, or even prove, as this Court's Rule 21.1(h) requires, how the foundations for presentation of federal issues in this Court were laid, the instant Petition presents a classic instance of a case where review of the final judgment of a state court should be denied. There is no doubt that the implementation of Article XII, § 4 of the Hawaii Constitution is an important question both to petitioners and to respondents. But that is not enough—and should not be enough—to warrant review in this Court. Granting review would not only require engineering federal questions out of a record and statutes where none can be found, but would grossly contravene not only the deference owed to state courts on state law issues, but also the precepts of sovereign immunity this Court routinely enforces under the Eleventh Amendment. Any claim that petitioners' procedural rights were violated by the ruling below, which, even viewed most favorably to petitioners, would require nullifying plain error rules that are a commonplace of appellate practice, is belied by the Trustees' own failure to preserve their claims via Rule 40, Haw. R. App. P.

I. Petitioners' Substantive Federal Claims Were Not Presented Below and Raise No Federal Issue.

A.

The requirement of 28 U.S.C. § 1257(3) that a federal "right, privilege or immunity" upon which relief in this Court is premised be "specially set up or claimed" stands as clear notice to state court litigants of the importance of timely raising all federal claims in *state* court. As this Court noted recently, "[e]ven if [this Court] were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, . . . the long-standing rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 106 S. Ct. 433, 436-37 (1985) (citations omitted); *see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). This presumption is reflected in this Court's Rule 21.1(h), which requires petitioners to state how "the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Although petitioners assert they "sought declaratory and injunctive relief requesting the court to enjoin the respondents from not following Congressional and State Legislation," Pet. at 4, the Trustees have not shown how they urged the Supreme Court of Hawaii that failure to award the relief they sought would violate OHA's claimed rights under federal law. In fact, petitioners simply abandoned the issue. The Trustees made no claim whatsoever in their complaints for enforcement of the Admission Act under 42 U.S.C. § 1983, *see Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467

(9th Cir. 1984) (*"Keaukaha II"*), nor, in response to the sovereign immunity arguments we advanced in the Supreme Court of Hawaii, did they argue that section 5(f), *ex proprio vigore*, creates rights in parties other than the United States, a view that had been rejected by *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1220-24 (9th Cir. 1978) (*"Keaukaha I"*), *cert. denied*, 444 U.S. 826 (1980). Nor did they claim that those rights encompass enforcement of state laws that effect section 5(f), a view foreclosed by *Keaukaha I* a fortiori.

Of course, "[w]here the state court has considered and decided [a federal] claim, [this Court] need not consider how or when the question was raised." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2385 n.8 (1987). But the basis for invoking this rule is lacking here. The court below did pass on the state-law issues necessary to petitioners' asserted federal claims, but, doubtless to avoid cross-jurisdictional conflicts that make work for this Court, did not pass on the nature of federal entitlements, if any, created by section 5(f). Because those issues, including the impact of *Cort v. Ash*, 422 U.S. 66 (1975), are not directly related to what was decided below, review is not justified by the "pressed or passed upon" rule. *See Illinois v. Gates*, 462 U.S. at 220; *cf. District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 484 n.16 (1983) (noting importance of giving state court opportunity to rule in light of federal arguments).

B.

Jurisdiction is absent for a more basic reason. The claims presented here simply do not implicate any federal

right, privilege, or immunity cognizable under 28 U.S.C. § 1257(3). As this Court has stressed in a related context, a claim can be deemed to "arise under" the laws of the United States only if a plaintiff establishes, at a minimum, that "federal law creates the cause of action," or a "'right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.'" *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 106 S. Ct. 3229, 3233 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)). *Merrell Dow* also holds that jurisdiction is unavailing for "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation." 106 S. Ct. at 3237. Petitioners do not seek to invoke section 5(f) as a defense, *see id.* at 3232, and, for this reason, the *Merrell Dow* test is dispositive of the jurisdictional question before this Court even if the petitioners pleaded breach of section 5(f) (which they did not). As the Ninth Circuit held in *Keaukaha I*, *supra*, "[t]he problem described in plaintiffs' complaint is essentially a matter of state concern," and, for this reason, no private cause of action lies for enforcement of section 5(f). 588 F.2d at 1224. The petitioners do not dispute this view, and, under *Merrell Dow*, there can be no review of substantive federal questions here.

The same result obtains even if 42 U.S.C. § 1983 can, at this late stage, be smuggled back into the case. This Court has made plain that § 1983 is unavailable "where Congress has foreclosed such enforcement of the statute in the enactment itself" or "where the statute did not

create enforceable rights, privileges or immunities within the meaning of § 1983." *Wright v. City of Roanoke Redevelopment & Housing Authority*, 107 S. Ct. 766, 770 (1987) (citations omitted). Congressional intent is critical to this analysis, and we simply cannot believe that Congress intended to abrogate the exclusive jurisdiction of the state courts over property returned to new states under the Equal Footing Doctrine, *see Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 (1977), whenever a private litigant, or even a governmental litigant other than the United States, could point to a breach of "the constitution and laws" of Hawaii that control lands subject to section 5(f) of the Admission Act. There is a "strong presumption against the defeat of state title," and the rule is that unless it can be shown "that Congress affirmatively intended" to limit State power prior to admission, the authority normally reserved to the States under the Equal Footing Doctrine controls. *See Utah Division of State Lands v. United States*, 107 S. Ct. 2318, 2324 (1987). Thus, although the United States may bring suit to enforce Hawaii's section 5(f) trust duties, there is no warrant for believing that Congress, in section 5(f), gave enforceable rights to anyone else. Accordingly, § 1983 cannot apply here.

Although the foregoing logic shows that the analysis to the contrary in *Keaukaha II*, 739 F.2d 1467 (9th Cir. 1984), is unsupported, this case does not require resolving whether § 1983 provides a remedy for violations of section 5(f). Even if the Ninth Circuit is right that § 1983 can redress provable claims that the State of Hawaii is not using 5(f) lands for "one *or* more" of the five broad purposes outlined in section 5(f), which is all *Keaukaha II*

stands for, *see* 739 F.2d at 1469, that hardly implies that there is a breach of section 5(f) whenever Hawaii, under the terms of its own laws, allocates too much to one 5(f) purpose, and not enough to another. *See Price v. State of Hawaii*, 764 F.2d 623, 625 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 793 (1986). Petitioners, recipients of more than $8 million from the section 5(f) trust, wish to convert every violation of "the constitution and laws" of Hawaii that govern section 5(f) lands into a breach of federal law. But deeming Congress to have federalized every state-law dispute over these hundreds of thousands of acres of Hawaiian lands, even as it welcomed Hawaii into the Union on "an Equal Footing with the other States," 73 Stat. 4, would be unprecedented. As this Court ruled more than 75 years ago:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws.

Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912), *quoted*, *Merrell Dow*, 106 S. Ct. at 3236 n.12. Unless this Court wishes to overturn numerous cases that rightly keep the federal courts out of state-law property disputes, it must deny review here.

II. Even if A Federal Issue Is Presented, There Is No Warrant for Overturning the Supreme Court of Hawaii.

Even if it could be thought that section 5(f) federalizes the "constitution and laws" of Hawaii that bear on the lands encompassed thereby, there is no reason to overturn the lower court's decision that petitioners' view was not "the intent of the legislature when the language of HRS § 10-13.5 was adopted." *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d at 458, Pet. App. at 27. While one might disagree about the deference owed the inferior federal courts' views of state law, *United States v. Hohri*, 107 S. Ct. 2246, 2253 n.6 (1987) (citing cases), this Court's deference is at its zenith when litigants attack state courts on their views of their own state's laws. *See Ricketts v. Adamson*, 107 S. Ct. 2680, 2684 n.3 (1987). Given a state court's state-law ruling on which federal issues depend, this Court will uphold the state court if there is any "fair or substantial basis" for the decision. *Demorest v. City Bank*, 321 U.S. 36, 42 (1944).

Such bases abound for the conclusions of the Supreme Court of Hawaii here. Although petitioners claim the law inalterably "requires State administrators to set aside 20% of the income from the [section 5(f)] lands to benefit native Hawaiians," Pet. at 7-8, as the Supreme Court of Hawaii held with respect to the *Hong* action, "nothing in HRS § 10-3, where the public land trust is described, serves as a statutory base for a ruling that [the damages received in the Molokai Ranch litigation] are funds derived from the public land trust or that a pro rata portion of the land conveyed to the State in lieu of the damages should in turn be conveyed to the Trustees of OHA."

737 P.2d at 458, Pet. App. at 25. The Hawaii courts have long recognized that "judicial legislation" may be "done only interstitially," *Hayes v. Gill*, 52 Haw. 251, 254 n.1, 473 P.2d 872, 875 n.1 (1970), *appeal dismissed*, 401 U.S. 968 (1971), and, in holding that solving recurring matters such as the relationship of past rents or damages to the Article XII trust crossed the line separating an "interstitial" matter from a "policy determination . . . of a kind normally reserved for nonjudicial discretion," 737 P.2d at 458, Pet. App. at 26, the Supreme Court of Hawaii simply applied this basic standard.

The rationale for abstaining in the *Yamasaki* action is even more deeply rooted in state law. There, the Court noted that the Legislature could not have intended the broad result petitioners sought, for that would conflict with numerous public programs arising out of "legislation establishing special funds to meet the State's obligations." *Id.* The magnitude of the conflicts between the State's proprietary programs and duties under § 10-13.5 plainly supported the Court's holding that the latter could not "be read literally." *Id.;* Pet. App. at 27.

Indeed, granting review in this case would only plunge this Court into a state constitutional swamp. As the court below noted, there are many doubts that the statutes on which petitioners base their claims comply with the constitutional amendments they were intended to implement. 737 P.2d at 454 n.15, Pet. App. at 16 n.15. *See also Kahalekai v. Doi*, 60 Haw. 324, 590 P.2d 543 (1979) (casting doubts on certain 1978 amendments, including several affecting OHA, *e.g.*, Haw. Const. art. XVI, § 7, cl. 2 (1978), and casting doubts on the meaning of amendments that passed, *compare id.* art. XI, § 10, *with id.* art. XII, § 4). Because

"this Court reviews judgments, not opinions," *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984), plenary review will place this Court in the untoward posture of assessing state statutory claims that may be wholly fanciful. Nothing in Rule 17, or the jurisprudence of Article III, suggests this Court's resources should be devoted to such a speculative enterprise. *See Allen v. Wright,* 468 U.S. 737, 751 (1984) (citing *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 (1976)).

III. Petitioners' Claims Are Barred by Sovereign Immunity.

Even if somehow this Court had authority under § 1257 and petitioners could prove the lower court misinterpreted state law, petitioners' claims would also be barred by the Eleventh Amendment. It is unnecessary for this Court even to explore the corners of the State Tort Liability Act, Haw. Rev. Stat. Ch. 662 (1985), or our Little Tucker Act, Haw. Rev. Stat. Ch. 661, neither of which offered relief below to petitioners. This case is now in federal court, and "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 99 n.8 (1984).

The central holding of *Pennhurst II, supra,* counsels against any review in this Court. Even if state law has been incorporated into the Admission Act "by reference," Pet. at 7, it remains true that there is "[no] greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct

to state law." 465 U.S. at 106. That, however, is exactly what OHA asks this Court to do. Even more important, petitioners' claims that "the relief requested is prospective, not retroactive in nature," Pet. at 7, is belied by the very "breach of trust" theory that animates their entire case. Virtually identical claims were held barred by the Eleventh Amendment in *Papasan v. Allain*, 106 S. Ct. 2932 (1986), which held that claims for breach of trust are no more than demands for "'"an *accrued* monetary liability."'" *Id.* at 2942 (quoting *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (quoting *Edelman v. Jordan*, 415 U.S. 651, 664 (1974))). There is nothing here that requires departing from the *Papasan* rule. *See also Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam).

IV. Petitioners' Procedural Claims are Also Meritless.

Petitioners devote substantial effort to conjuring procedural errors out of the holding below. Pet. at 9. Even if the State of Hawaii somehow owes federal constitutional duties to its own governmental agencies, *but cf. Evitts v. Lucey*, 469 U.S. 387, 393 (1985), there is nothing to show that petitioners' procedural rights were tampered with. The lower court's recitation of state-law justiciability principles, *see* 737 P.2d at 455-57, Pet. App. at 20-22, shows that petitioners were on notice of the rules of the game, and it is established, indeed "axiomatic," in Hawaii, as elsewhere, that jurisdictional defects will be noticed *sua sponte*. *See Bacon v. Karlin*, 727 P.2d 1127, 1129 (Haw. 1986) (citing *BDM, Inc. v. Sageco, Inc.*, 57 Haw. 73, 73, 549 P.2d 1147, 1148 (1976)). *Engle v. Isaac*, 456 U.S. 107 (1982), notes that state courts "have the primary respon-

sibility to interpret and apply their plain-error rules," *id.* at 135 n.44. *Engle* disposes of the procedural claims.

Moreover, this case is simply another demonstration that "[c]ase-or-controversy considerations . . . 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.'" *Allen v. Wright*, 468 U.S. 737, 760 (1984). The gist of the Supreme Court of Hawaii's ruling, albeit couched in the language of the political question doctrine, is that petitioner's claims were not supported by the statutes they raised. *Cf. Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 92-93 (1980) (Marshall, J., concurring). The petitioners do not dispute that the meaning of state law was extensively briefed in connection with the sovereign immunity arguments we raised below. Hence, any claim that petitioners "were not allowed an opporunity to file a brief or otherwise dispute" the main issue below, Pet. at 9, is unfounded. Of course, even if the decision below was a surprise, which it was not, petitioners could have moved for reconsideration under Haw. R. App. P. 40, which "provides the parties with an opportunity to challenge errors in the formulation of the court's initial decision in a case." *Robinson v. Ariyoshi*, 65 Haw. 641, 660, 658 P.2d 287, 302 (1982). Petitioners were afforded procedural due process, and they lost. This was not a case where a litigant was deprived of property "without its ever having had an opportunity to defend against the exaction." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679 (1930). The right to procedural due process is the right to "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central*

Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). It is not the right to win.

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CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THE TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS,	) CIVIL NO. 79260
Plaintiffs,	) COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; SUMMONS
vs.	
TANY S. HONG, in his official capacity as the Attorney General of the State of Hawaii, SUSUMO ONO, in his official capacity as Chairman of the Board of Land and Natural Resources, and JENSEN HEE, in his official capacity as Director of Finance,	) 1st CIRCUIT COURT STATE OF HAWAII
	) FILED 1983 SEP-7 AM 10:54
Defendants.	) S. IKEDA CLERK

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, the Trustees of the Office of Hawaiian Affairs, through their attorneys Brown and Durant, for claims for relief against the above-named Defendants allege as follows:

I. JURISDICTION

1. This is a declaratory judgment action brought pursuant to Chapter 632 of the Hawaii Revised Statutes. HRS Section 632-1 confers jurisdiction on this Court. HRS Section 632-3 empowers this Court to grant equitable relief based upon the judgment of this Court declaring the rights

of the parties concerning the matters in controversy as hereinafter alleged.

II. PARTIES

2. The Office of Hawaiian Affairs (hereinafter sometimes referred to as "OHA") is a governmental entity established by Article XII—Section 5 of the Constitution of the State of Hawaii. By virtue of Article XII—Sections 5 and 6 of the Constitution of the State of Hawaii, as amended, and HRS Chapters 10 and 13-D, an elected Board of Trustees (hereinafter sometimes referred to as the "Trustees") manages and administers the affairs and assets of the Office of Hawaiian Affairs.

3. Plaintiffs are the duly elected and qualified members of the Board of Trustees of the Office of Hawaiian Affairs.

4. Defendant Tany S. Hong is the Attorney General of the State of Hawaii and is sued in his official capacity. The Attorney General is required by HRS Section 26-7 and Section 28-3 to give his opinions on questions of law submitted to him by governmental agencies and by HRS Section 28-4 to advise and counsel public officers in matters connected with their public duties. Pursuant to HRS Section 26-7 the Office of the Attorney General represented the State of Hawaii in the litigation and matters hereinafter referred to.

5. Defendant Susumo Ono is the Chairman of the Board of Land and Natural Resources and is sued in his official capacity. By virtue of HRS Section 26-15 the Board of Land and Natural Resources (hereinafter the "BLNR") heads the Department of Land and Natural Resources (hereinafter the "DLNR"). Pursuant to HRS Section 26-

15 the DLNR manages and administers the public lands of the State of Hawaii and its water and mineral resources.

6. Defendant Jensen Hee is the Director of Finance of the State of Hawaii, who pursuant to HRS Section 26-8, is the head of the Department of Budget and Finance and is sued in his official capacity. Pursuant to HRS Section 26-8 the Department of Budget and Finance has custody of state funds and is responsible for the safekeeping and disbursement thereof.

III. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

7. The Office of Hawaiian Affairs was created by Amendments to the Constitution of the State of Hawaii which were ratified by the electorate on November 7, 1978.

8. Article XII Section 4 of the Constitution of the State of Hawaii, as amended, provides in relevant part that "The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, . . . *shall be held by the State as a public trust for native Hawaiians* and the general public." These lands are commonly and hereinafter referred to as "ceded lands."

9. Article XVI, Section 7 of the Constitution of the State of Hawaii, as amended, provides that "Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds or income therefrom, shall be complied with by appropriate legislation. *Such legislation shall not diminish or limit the benefits of native Hawaiians under section 4 of Article XII*".

10. Article XII, Section 6 provides in relevant part that the Board of Trustees of the Office of Hawaiian Affairs shall ". . . manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, *including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article* for Native Hawaiians."

11. Article XVIII Section 8 of the Constitution of the State of Hawaii, as amended, required the legislature to provide for the implementation of the amendments to Article XII, Sections 5 and 6 on or before the first general election following ratification of those amendments. The amendments were ratified November 7, 1978.

12. In 1979 the legislature enacted HRS Chapter 10, Section 10-3(1) of which provides that the purpose of OHA includes "The betterment of conditions of native Hawaiians. A pro rata portion of all funds derived from the public land trust shall be funded in an amount determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of conditions of native Hawaiians. For the purpose of this chapter, *the public land trust shall be all proceeds and income from the sale lease or other disposition of* [*ceded lands*]".

13. In 1980 the legislature enacted HRS Section 10-13.5 which provides that "Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by [OHA]for the purposes of this chapter."

IV CLAIM FOR RELIEF

14. By virtue of the foregoing constitutional and statutory provisions, OHA is entitled to receive twenty percent

(20%) of the proceeds from the sale or other disposition of ceded lands and natural resources and minerals from such ceded lands.

15. On April 10, 1958 Molokai Ranch and HC&D, Ltd. entered into a contract by the terms of which HC&D was allowed, in exchange for the payment of a royalty to Molokai Ranch, to mine sand from Papohaku Beach on the island of Molokai.

16. The royalty was 50 cents per cubic yard and as of June 30, 1973 Molokai Ranch had received a total of $1,279,006.00 in royalty payments from HC&D.

17. An issue arose as to whether the sand was being taken from land owned by Molokai Ranch or whether the area of Popohaku Beach from which the sand was being removed belonged to the State of Hawaii.

18. In 1973 Litigation was commenced in the Land Court of the State of Hawaii to resolve the question of whether or not the sand was being taken or had been taken from state owned beach property.

19. The decision of the Land Court concerning the location of the seaward boundary of Molokai Ranch's property adjacent to Papohaku Beach indicated that some or all of the sand had been taken by HC&D from State property pursuant to its agreement with Molokai Ranch and for which HC&D had paid royalties of $1,279,006.00.

20. As a consequence of that decision the State of Hawaii sought damages and/or compensation for the sand which had been taken from State property in an amount equal to the $1,279,006.00 which had been paid by HC&D to Molokai Ranch as a royalty.

21. The land at Popohaku Beach owned by the State of Hawaii from which the State contended that the sand had been removed is "ceded lands" in that they were granted to the State of Hawaii by Section 5(b) of the Admissions Act.

22. In 1982 the State of Hawaii settled its outstanding claims and litigation against Molokai Ranch by agreeing to accept a conveyance of real property owned by Molokai Ranch of a value approximately equal to the $1,279,006.00 sum in dispute.

23. The land received by the State of Hawaii in settlement of its claims against Molokai Ranch constitutes "proceeds" from the disposition of state owned sand which is both a natural resource and a mineral.

24. The State of Hawaii, upon the opinion and advice of its Attorney General, Defendant Hong, denies that OHA is entitled to receive or share in any part of the land received by the State of Hawaii as proceeds from the disposition of State owned sand from ceded lands. Pursuant to such advice from Defendant Hong, the State of Hawaii, through its appropriate agencies, refuses either to transfer an ownership interest in the land received as compensation for the disposition of the sand or to pay to OHA 20% of the value of such land.

25. Plaintiffs allege upon information and belief that Defendants' refusal to transfer to OHA a 20% interest in the land or its equivalent in cash is based upon their contention that since the sand was severed from state owned land prior to November 7, 1978 before the constitutional amendments creating OHA were ratified by the electorate, OHA is not entitled to share in the proceeds even though the amount and nature of the proceeds were negotiated and paid after OHA's formation.

26. As a matter of law, a sale is a transfer of property for a fixed price in money or its equivalent.

27. As a matter of law a contract of sale occurs only when there is an agreement as to the property to be transferred and the compensation to be received and a sale itself occurs only when the property is transferred and the consideration paid or tendered.

28. No sale or other disposition of the stated owned sand from Papohaku Beach took place or could take place until there was an agreement as to the consideration to be received by the State of Hawaii for such disposition and such consideration was transferred to the State of Hawaii.

29. It was not until 1982 that the terms of the settlement were agreed to by the State of Hawaii and Molokai Ranch. The land (which was the consideration transferred to the State of Hawaii for Papohaku Beach Sand) constituted the "proceeds" from the disposition of such sand. Such proceeds were not received by the State until 1982.

30. Therefore, the sale or other disposition of state owned sand, a natural resource and mineral from ceded lands, took place in 1982, several years after the creation of OHA and after the establishment of its entitlement to receive 20% of the proceeds from the sale or disposition of ceded lands or natural resources and minerals therefrom.

31. OHA is entitled to receive 20% of the proceeds from the State's disposition of the sand from Papohaku Beach.

32. OHA is entitled to a declaratory judgment determining that it is the owner of an undivided 20% interest in the land received by the State of Hawaii in 1982 from Molo-

kai Ranch as proceeds from the disposition of State owned sand and to a mandatory injunction directed to Defendant and directing him to execute and record an appropriate conveyance to OHA of such 20% undivided interest.

33. Alternatively, OHA is entitled to a declaratory judgment determing that the State of Hawaii shall pay over to OHA cash in an amount equal to 20% of the appraised value of such real property which should be no less than $255,801.20 and upon determination of the appropriate amount, to a mandatory injunction directed to Defendant Hee ordering him to pay over such sum to OHA.

WHEREFORE Plaintiffs, the Trustees of the Office of Hawaiian Affairs pray that this Court enter a declaratory judgment which adjudges and decrees:

1. That the state owned portion of Papohaku Beach from which sand was removed by HC&D pursuant to its contract with Molokai Ranch is "ceded land" referred to in Article XII, Section 4 of the Constitution, HRS Chapter 10 and Section 5 of the Admission Act.

2. That the sale or disposition of such sand occurred after November 7, 1978.

3. That OHA is entitled to receive 20% of the proceeds realized by the State of Hawaii from its disposition of sand from Papohaku Beach.

4. That OHA is entitled to a conveyance from the Defendant Susumo Ono on behalf of the State of Hawaii of an undivided 20% interest in the land which constituted the proceeds from the disposition of Papohaku Beach sand.

5. That in the alternative OHA is entitled to receive from the State of Hawaii through its Department of Budget

and Finance, cash in an amount equal to 20% of the appraised value of the land received as proceeds from the disposition of Papohaku Beach sand but no less that $255,-801.20.

6. That Plaintiffs are entitled to recover their costs of suit and attorneys fees.

7. That this Court grant such other and further relief which the Court deems proper.

8. That this Court enter mandatory injunction appropriate to implement its judgment.

DATED: Honolulu, Hawaii, September 7, 1983.

/s/ Boyce R. Brown, Jr.

BOYCE R. BROWN, JR.
BROWN & DURANT
Attorneys for the Trustees of
the Office of Hawaiian Affairs

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THE TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS, Plaintiffs, vs. WAYNE J. YAMASAKI, individually and in his official capacity as the Director of the Department of Transportation of the State of Hawaii, THE ALOHA TOWER DEVELOPMENT CORPORATION, SUSUMO ONO, individually and in his official capacity as the Chairman of the Board of Land and Natural Resources of the Department of Land and Natural Resources of the State of Hawaii, TANY HONG, individually and in his official capacity as the Attorney General of the State of Hawaii, and JENSEN HEE, individually in his official capacity as Director of Finance, Defendants.	CIVIL NO. 81939 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; SUMMONS 1st CIRCUIT COURT STATE OF HAWAII FILED 1984 MAR-8 AM 8:34 H. SETO CLERK

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, the Trustees of the Office of Hawaiian Affairs, through their attorneys Brown and Durant and

Schutter Pavey Cayetano, for claims for relief against the above-named Defendants allege as follows:

I. JURISDICTION

1. This is a declaratory judgment action brought pursuant to Chapter 632 of the Hawaii Revised Statutes. HRS Section 632-1 confers jurisdiction on this Court. HRS Section 632-3 empowers this Court to grant equitable relief based upon any judgment entered by this Court declaring the rights of the parties concerning the matters in controversy as hereinafter alleged.

2. This Court also has jurisdiction over the matters in controversy by virtue of Art. VI, Sec. 1 of the Constitution of the State of Hawaii, HRS Secs. 603-21.5, 603-21.9(6), 603-21.7(b).

II. PARTIES

3. The Office of Hawaiian Affairs (hereinafter sometimes referred to as "OHA") is a body corporate which is a governmental entity independent of the executive branch established by Article XII—Section 5 of the Constitution of the State of Hawaii and HRS Chapter 10. By virtue of Article XII—Sections 5 and 6 of the Constitution of the State of Hawaii, as amended, and HRS Chapters 10 and 13-D, an elected Board of Trustees (hereinafter sometimes referred to as the "Trustees") manages and administers the affairs and assets of the Office of Hawaiian Affairs.

4. Plaintiffs are the duly elected and qualified members of the Board of Trustees of the Office of Hawaiian Affairs.

5. Defendant WAYNE J. YAMASAKI is the Director of the Department of Transportation of the State of

Hawaii (hereinafter DOT) and is sued both individually and in his official capacity. The State of Hawaii has transferred to DOT jurisdiction and control of thousands of acres of land which are subject to the trust established by Sec. 5(f) of the Admissions Act. The DOT derives tens of millions of dollars of income and proceeds from the sale, lease or other disposition of such lands but on the advice of Defendant Hong, DOT refuses to give OHA any part of such income and proceeds.

6. Defendant TANY S. HONG is the Attorney General of the State of Hawaii and is sued individually and in his official capacity. The Attorney General is required by HRS Section 26-7 and Section 28-3 to give his opinions on questions of law submitted to him by governmental agencies and is required by HRS Section 28-4 to advise and counsel public officers in matters connected with their public duties. Pursuant to HRS Sections 26-3, 26-7 and 28-4 the Office of the Attorney General has issued an opinion which erroneously concludes that the Office of Hawaiian Affairs is not entitled to receive any part of the income and proceeds derived by Defendant DOT from lands under its control which are subject to the trust established by Sec. 5(f) of the Admissions Act. As a result, Defendants and other State agencies also are refusing to remit to the Office of Hawaiian Affairs its rightful share of the income and proceeds derived from lands under their control which are subject to the trust established by Sec. 5(f) of the Admissions Act.

7. Defendant SUSUMO ONO is the Chairman of the Board of Land and Natural Resources and is sued individually and in his official capacity. By virtue of HRS Section 26-15 the Board of Land Natural Resources (hereinafter the "BLNR") heads the Department of Land and

Natural Resources (hereinafter the "DLNR"). Pursuant to HRS Section 26-15 the DLNR manages and administers the public lands of the State of Hawaii and its water and mineral resources unless jurisdiction has been transferred to another agency by executive order or otherwise.

8. Defendant JENSEN HEE is the Director of Finance of the State of Hawaii, who pursuant to HRS Section 26-8, is the head of the Department of Budget and Finance and is sued individually and in his official capacity. Pursuant to HRS Section 26-8 the Department of Budget and Finance has custody of state funds and is responsible for the safekeeping and disbursement thereof including funds as to which OHA is entitled to receive a pro rata share but which Defendants have refused to pay over to OHA.

9. Defendant ALOHA TOWER DEVELOPMENT CORPORATION (ATDC) was created in 1981 by Act 236 (HRS Chapter 206J). HRS 206J-4 established ATDC as a public body corporate. HRS 206J-5 empowered ATDC to sue or be sued. HRS 206J-3 describes the boundaries of the lands included within the Aloha Tower complex. A portion of the lands included within the Aloha Tower complex are lands which are subject to the trust established by Sec. 5(f) of the Admissions Act. ATDC takes the position that OHA is not entitled to receive any part of the income and proceeds which will be generated by the Aloha Tower complex which is to be built upon such lands.

III. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

10. Section 5(f) of the Admissions Act established a public trust which consists of

A. All ceded lands (i.e. lands ceded to the USA by the Republic of Hawaii when Hawaii became a territory), title to which was transferred back to Hawaii upon statehood pursuant to section 5(b) of the Admissions Act.

B. All ceded lands and territorial lands which were under the control of the USA at statehood but which were returned to Hawaii before August 21, 1964 pursuant to section 5(e) of the Admissions Act.

C. All ceded and territorial lands which were under the control of the USA at statehood but which were returned to Hawaii after August 21, 1964 pursuant to Public Law 88-233.

D. All proceeds from the sale or other disposition of the lands included in A, B, and C above.

E. All income derived from the lands included in A, B, and C above.

This trust is hereinafter referred to as the "5(f) Trust". The lands described in A, B, and C above are hereinafter referred to as the "5(f) Trust Lands."

11. Section 5(f) of the Admissions Act requires that the land, proceeds and income derived by the State from the sale, lease or other disposition of 5(f) Trust Lands be held by the State of Hawaii as a public trust for five specific

purposes, one of which is "for the betterment of the conditions of native Hawaiians", Section 5(f) provides that use of the lands, proceeds and income "for any other object shall constitute a breach of trust."

12. The Office of Hawaiian Affairs was created by Amendments to the Constitution of the State of Hawaii which were ratified by the electorate on November 7, 1978.

13. Article XII Section 4 of the Constitution of the State of Hawaii, as amended, provides in relevant part that "The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, . . . *shall be held by the State as a public trust for native Hawaiians* and the general public."

14. Article XVI, Section 7 of the Constitution of the State of Hawaii, as amended, provides that "Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds or income therefrom, shall be complied with by appropriate legislation. *Such legislation shall not diminish or limit the benefits of native Hawaiians under section 4 of Article XII*".

15. Article XII, Section 6 of the Constitution of the State of Hawaii provides in relevant part that the Board of Trustees of the Office of Hawaiian Affairs shall " . . . manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, *including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article* for Native Hawaiians."

16. Article XVIII Section 8 of the Constitution of the State of Hawaii, as amended, required the legislature to provide for the implementation of the amendments to Article XII, Sections 5 and 6 on or before the first general election following ratification of those amendments. The amendments were ratified November 7, 1978.

17. In 1979 the legislature enacted Act 196 (HRS Chapters 10 and 13D). That bill became law on June 7, 1979. HRS Section 10-3(1) states that the purpose of OHA is to bring about "the betterment of conditions of native Hawaiians" and goes on to provide that a pro rata portion of all funds derived from the 5(f) Trust Lands shall be funded in an amount determined by the legislature for such purpose, and requires that such funds shall be held and used solely as a public trust for the betterment of conditions of native Hawaiians. For the purpose of chapter 10, *the public land trust is defined as " . . . all proceeds and income from the sale, lease or other disposition of [ceded lands]."*

18. In 1980 the legislature passed Act 273 which was signed into law on June 16, 1980. It is now codified at HRS Section 10-13.5 which provides that "Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by [OHA] for the purposes of this chapter."

19. By virtue of the foregoing constitutional and statutory provisions, OHA is entitled to receive twenty percent (20%) of the proceeds from the leasing, sale or other disposition of the 5(f) Trust Lands (including the natural resources and minerals derived therefrom) and twenty percent (20%) of any other income derived from the 5(f) Trust Lands.

IV CLAIMS FOR RELIEF

CLAIM *ONE*: OHA IS ENTITLED TO RECEIVE 20% OF THE INCOME AND PROCEEDS DERIVED FROM THE LANDS CONVEYED TO THE STATE UNDER PUBLIC LAW 88-233.

20. The allegations of Paragraphs 1 through 19 are realleged and incorporated in this Paragraph by reference.

21. Lands returned to Hawaii under Public Law 88-233 are subject to the same Section 5(f) trust as are lands returned under Sections 5(b) and 5(e) of the Admissions Act.

22. The State of Hawaii wrongfully refuses to concede that OHA is entitled to 20 percent of the funds derived from lands conveyed to the State under Public Law 88-233 and wrongfully refuses to pay over such funds to OHA.

23. OHA is entitled to a judgment in its favor determining that OHA is entitled to receive 20% of the funds derived from lands conveyed to the State of Hawaii pursuant to Public Law 88-233 and to an injunction directing the State to pay over such sums to OHA.

24. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978.

CLAIM TWO: OHA IS ENTITLED TO RECEIVE 20% OF ALL INCOME AND PROCEEDS DERIVED FROM 5(f) TRUST LANDS FROM AND AFTER NOV. 7, 1978.

25. Article XII Section 5 of the Constitution of the State of Hawaii (The Constitutional amendment creating

the Office of Hawaiian Affairs) was ratified by the voters on Nov. 7, 1978.

26. Article XII Section 6 of the Constitution of the State of Hawaii as amended on Nov. 7, 1978 provides that the Office of Hawaiian Affairs is to manage and administer a pro rata portion of all income and proceeds from lands granted to the State of Hawaii by Section 5(b) of the Admissions Act which are held by the State as a public trust for native Hawaiians and the general public (i.e., the 5(f) Trust Lands).

27. Article XVII, Section 16 states that "The provision of this constitution shall be self-executing to the fullest extent that their respective natures permit.

28. Article XVIII, Section 8 of the Constitution of the State of Hawaii as amended on Nov. 7, 1978 requires the legislature provide for the implementation of Art. XIII, Section 5 and 6 before the general election next following Nov. 7, 1978.

29. Pursuant to Art. XVIII, Section 8, Act 196 (HRS Chapter 10 and 13D) was enacted in 1979 and signed into law on June 7, 1979. That act implemented Article XII Sections 5 and 6 and provided among other things that "a pro rata portion of *all the funds derived* from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used *solely* as a public trust for the betterment of the conditions of Native Hawaiians." (HRS 10-3(1)).

30. In 1980, the legislature passed Act 273 which was signed into law on June 16, 1980 and which provides that "twenty per cent of *all funds derived* from the public land

trust described in section 10-3 shall be expended by the office of Hawaiian Affairs . . . for the purposes of this chapter. (HRS 10-13.5)

31. By virtue of the foregoing constitutional and statutory provisions OHA was established and entrusted with a pro rata share of the income and proceeds derived from the 5(f) Trust. Such establishment and such entrustment occurred on Nov. 7, 1978. From and after that date OHA is entitled to receive a pro rata share of income and proceeds derived from the 5(f) Trust Lands in an amount determined by the legislature.

32. Once the legislature determined that OHA's pro rata share of the income and proceeds from the 5(f) Trust Lands was to be 20% of "*all funds derived*" from the 5(f) Trust Lands, OHA became entitled to receive such funds effective Nov. 7, 1978 because that part of the constitutional amendment is self executing.

33. Despite repeated requests that the State pay over 20% of all income and proceeds, (i.e. all funds derived) from the sale, lease or other disposition of the lands included in the 5(f) Trust from and after November 7, 1978, the State has refused to do so.

34. In the alternative from and after the date OHA's implementing legislation became law on June 7, 1979 OHA was entitled to receive its 20% prorata share of the income and proceeds derived from the 5(f) Trust Lands.

35. Despite repeated requests that the State pay over 20% of all income and proceeds, i.e. all funds derived from the lease, sale or other disposition of the lands included

in the 5(f) Trust from and after June 7, 1979, the state has refused to do so.

36. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978 or in the alternative from and after June 7, 1979.

CLAIM THREE: OHA IS ENTITLED TO RECEIVE 20% OF THE INCOME AND PROCEEDS DERIVED BY THE DEPARTMENT OF TRANSPORTATION FROM LEASES AND OTHER DISPOSITIONS OF 5(f) TRUST LANDS FOR NON-GOVERNMENTAL USES.

37. The allegations of paragraphs 1 through 35 are realleged and incorporated herein by reference.

38. The Governor of the State of Hawaii has by executive order transferred control and jurisdiction of thousands of acres of 5(f) Trust Lands located throughout the State to the DOT. Many of the 5(f) Trust Lands so transferred, or otherwise under the control of the DOT, are used by DOT for governmental functions from which no revenue is derived, e.g. to build highways.

39. However, many of the 5(f) Trust Lands under the control or jurisdiction of the DOT are leased by DOT to private individuals or entities for their private or commercial use including, for example, the operation of bars and restaurants, retail outlets, various repair, maintenance and service operations and numerous other uses which are not part of DOT's governmental functions.

40. Income and proceeds derived by DOT from such leases and concessions constitute income and proceeds de-

rived from 5(f) Trust Lands which are being used for private profit, but DOT, on the advice of Defendant Hong refuses to pay to OHA its pro rata share of such income.

41. OHA is entitled to a judgment holding that the DOT is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands (or concessions upon lands) included in the 5(f) Trust for non governmental uses.

42. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978.

CLAIM FOUR: OHA IS ENTITLED TO RECEIVE A PRO RATA SHARE OF THE INCOME AND PROCEEDS DERIVED BY THE DEPARTMENT OF TRANSPORTATION FROM SALES, LEASES OR OTHER DISPOSITIONS OF 5(f) TRUST LANDS AT SAND ISLAND

43. The allegations of Paragraphs 1 through 40 are realleged and incorporated in this Paragraph by reference.

44. Sand Island contains about 507 acres of land plus surrounding submerged lands. Title to 16 acres was acquired by the State of Hawaii pursuant to Section 5(b) of the Admissions Act. Title to 360 acres was acquired by the State pursuant to Public Law 88-233 of which 244 acres are fast land and 116 acres are submerged land. These lands are all part of the 5(f) Trust Lands.

45. Title to 202 acres was transferred to the Territory of Hawaii by a Presidential Executive Order one day

before statehood, i.e., the Executive Order was signed after passage of the Admissions Act but one day before Hawaii became a state. The circumstances surrounding the transfer of these 202 acres to the State of Hawaii require that they be included as part of the 5(f) Trust Lands.

46. 144 acres at Sand Island are under the jurisdiction of the Department of Transportation (DOT) and are being leased to matson Navigation for its use as a container yard/marginal wharf and storage area. 110 of the 144 acres (76.388%) are lands acquired pursuant to Public Law 88-233 and 34 acres are part of the 202 acres transferred by Presidential Executive Order to the Territory of Hawaii one day before statehood.

47. OHA has been and will continue to be entitled to receive 20% of the income and proceeds, i.e., all funds derived from the sale, leasing, licensing or other disposition of all lands, (including submerged lands), at Sand Island which are part of the 5(f) Trust Lands and are under DOT's jurisdiction.

48. OHA is entitled to a judgment that the DOT is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of 5(f) Trust Lands at Sand Island.

49. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978.

CLAIM FIVE: OHA IS ENTITLED TO RECEIVE 20% OF THE INCOME AND PROCEEDS DERIVED BY THE DEPARTMENT OF LAND AND NATURAL RESOURCES FROM SALES, LEASES OF OTHER DISPOSITIONS OF LANDS AT SAND ISLAND.

50. The allegations of Paragraphs 1 through 46 are realleged and incorporated in this Paragraph by reference.

51. Sixty three acres of the 202 acres of land at Sand Island returned to the territory of Hawaii one day before statehood are under the jurisdiction of the Department of Land and Natural Resources (DLNR) and are leased out under revocable permits for light industrial uses.

52. These Sixty Three acres of land are properly included in the lands which comprise the 5(f) Trust Lands.

53. OHA has been and will continue to be entitled to receive 20% of the income and proceeds i.e., all funds derived from the leasing, licensing or other disposition of these 63 acres or any other lands, including submerged lands, at Sand Island which are under DLNR's jurisdiction.

54. OHA has requested that the DLNR pay over to OHA 20% of the income and proceeds from leasing, licensing or other disposition of these 62 acres but the DLNR, upon the advice of Defendant Hong refuses to do so.

55. OHA is entitled to a judgment holding that the DLNR is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale,

lease or other disposition of 5(f) Trust Lands at Sand Island including the 63 acres hereinabove referred to.

56. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978.

CLAIM SIX: OHA IS ENTITLED TO RECEIVE A PRO RATA SHARE OF THE INCOME AND PROCEEDS DERIVED BY THE DEPARTMENT OF TRANSPORTATION FROM HARBORS THROUGHOUT THE STATE.

57. The allegations of Paragraph 1 through 52 are realleged and incorporated in this Paragraph as if fully restated herein.

58. At least 1483 acres of land, including submerged lands, have been set aside by Gubernatorial executive orders or by other devices to the DOT for use for harbor purposes throughout the State of Hawaii. Of the 1483 acres, at least 996.6 acres of 67.202% are lands which are part of the 5(f) Trust.

59. Out of the 996.6 acres title to at least 883.6 acres was acquired by the State of Hawaii pursuant to section 5(b) of the Admissions Act; title to at least 43 acres was acquired pursuant to section 5(e) of the Admissions Act, and, title to at least 120 of the acres was acquired pursuant to Public Law 88-233.

60. Honolulu Harbor contains at least 408 acres of which at least 224 acres or 54.902% are 5(f) Trust Lands.

61. OHA has been and will continue to be entitled to receive at least 20% of 54.902% or 10.980% of all income and proceeds, i.e., all funds derived from the operation of Honolulu Harbor.

62. Kahalui Harbor contains at least 405 acres of which at least 375 acres or 92.593% are 5(f) Trust Lands. As a result OHA has been and will continue to be entitled to receive at least 20% of 92.593% or 18.519% of all income and proceeds, i.e., all funds derived from the operations of Kahalui Harbor.

63. Kawaihae Harbor contains at least 127 acres of which at least 106 acres or 83.465% are 5(f) Trust Lands. As a result OHA has been and will continue to be entitled to receive at least 20% of 83.465% or 16.6930% of all income and proceeds i.e., all funds derived from the operation of Kawaihae Harbor.

64. Port Allen Harbor contains at least 13 acres of which 10 or 76.923% are 5(f) Trust Lands. OHA has been and will continue to be entitled to receive 20% of 76.923% or 15.3846% of all income and proceeds, i.e., all funds derived from the operations of Port Allen Harbor.

65. Kaunakakai Harbor contains at least 114 acres all of which are 5(f) Trust Lands. OHA has been and will continue to be entitled to receive at least 20% of all income and proceeds, i.e., all funds derived from the operation of Kaunakakai Harbor.

66. Kewalo Basin Harbor contains at least 55 acres of which at least 47 acres or 85.455% are 5(f) Trust Lands. OHA has been and will continue to be entitled to receive 20% of 85.455% or 17.0910% of all income and proceeds,

i.e., all funds derived from the operation of Kewalo Basin Harbor.

67. Small boat harbors throughout the State of Hawaii contain a total acreage of at least 277.5 acres of which at least 120.6 acres are 5(f) Trust Lands.

68. Less that 1% (.08%) of the lands included in Ala Wai Harbor on Oahu are includable in the 5(f) Trust. Therefore 20% of .08% or .016% of the income and proceeds, i.e., all funds derived from the operation of the AlaWai Harbor is owed to OHA by DOT.

69. All of Keehi Harbor on Oahu is part of the 5(f) Trust Land. Therefore 20% of the income and proceeds, i.e., all funds derived from the operation of Keehi Harbor is owed to OHA.

70. At least 51.613% of Haleiwa Harbor on Oahu is 5(f) Trust Land. Therefore at least 20% of 51.613% or 10.3226% of the income and proceeds, i.e., all funds derived from the operation of Haleiwa Harbor is owed to OHA.

71. 100% of Heeia Kea Harbor on Oahu is includeable in the 5(f) Trust. Therefore 20% of the income and proceeds, i.e. all funds derived from the operation of Heeia Kea Harbor is owed to OHA.

72. 100% of Keauhou Harbor on Hawaii is 5(f) Trust Land. Therefore 20% of the income and proceeds, i.e., all funds derived from the operation of Keahou Harbor is owed to OHA.

73. 96.70% of Maalaea Harbor on Maui is 5(f) Trust Land. Therefore 20% of 96.70% or 19.394% of the in-

come and proceeds, i.e., all funds derived from the operation of Moalaea Harbor is owed to OHA.

74. All of the lands included in Lahaina Harbor on Maui are 5(f) Trust Land. Therefore 20% of the income and proceeds, i.e., all funds derived from the operation of Lahaina Harbor is owed to OHA.

75. All of the land included in Nawiliwili Harbor on Kauai are 5(f) Trust Lands. Therefore 20% of the income and proceeds, i.e., all funds derived from the operations of Nawiliwili Harbor is owed to OHA.

76. All of the land included in Kikiaola Harbor on Kauai are 5(f) Trust Lands. Therefore 20% of the income and proceeds, i.e., all funds derived from the operation of Kikiaola Harbor is owed to OHA.

77. The acreages and percentages alleged in paragraphs 54 through 72 are approximate, based upon the best information available at the present time and subject to change as discovery proceeds in this action.

78. Although demand has been made by OHA upon DOT that DOT pay to OHA its pro rata share of the income and proceeds derived by DOT from harbor operations located on lands which are included in the 5(f) Trust, DOT on the advice of Defendant Hong has refused to do so.

79. OHA is entitled to a judgment in its favor holding that DOT is required to pay over to OHA its pro rata share of all income and proceeds derived from the sale, lease, use, granting of concessions, licensing or other disposition of the lands (including submerged lands) in har-

bors which contain, in whole or in part, lands which are included in the 5(f) Trust.

80. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978.

CLAIM SEVEN: OHA IS ENTITLED TO RECEIVE A PRO RATA SHARE OF THE INCOME AND PROCEEDS DERIVED BY THE DEPARTMENT OF TRANSPORTATION FROM THE OPERATION OF THE HONOLULU INTERNATIONAL AIRPORT

81. The allegations of Paragraphs 1 through 75 are realleged in this Paragraph by reference.

82. The Governor of the State of Hawaii has by Executive Order (EO) transferred to the DOT control of various parcels of lands (including submerged lands) which are included in the 5(f) Trust. About 13,173 acres of such lands have been and are being used for airports throughout the State.

83. The Honolulu International Airport contains about 4,480 acres of land of which approximately 3,567.1 acres (79.622%) are 5(f) Trust Lands. Title to at least 3,050.1 acres was conveyed to the State of Hawaii by section 5(b) of the Admissions Act and at least 517 acres were conveyed to the State of Hawaii pursuant to Public Law 88-233.

84. OHA has been and will continue to be entitled to receive at least 20% of 79.622% or 15.924% of the income and proceeds, i.e., all funds derived from the operation of Honolulu International Airport by DOT.

85. Although demand has been made by OHA upon DOT that it pay to OHA its pro rata share of the income and proceeds derived by DOT from the operation of Honolulu Airport, DOT upon the advice of Defendant Hong refuses to do so.

86. OHA is entitled to a judgment in its favor requiring DOT to pay to OHA its pro rata share of the income and proceeds derived by DOT from the operation of the Honolulu International Airport.

87. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978.

CLAIM EIGHT: OHA IS ENTITLED TO RECEIVE A PRO RATA SHARE OF THE INCOME AND PROCEEDS DERIVED BY THE ALOHA TOWER DEVELOPMENT CORPORATION FROM 5(f) TRUST LANDS

88. Paragraphs 1 through 81 are realleged and incorporated herein by reference.

89. Aloha Tower Development Corporation (ATDC) is a body corporate and a public instrumentality created by Act 236 in 1981. Act 236 is now codified as HRS Chapter 206J.

90. HRS 206J-3 designates the boundaries of the Aloha Tower Complex and HRS 206J-5 empowers the ATDC to develop an office, hotel and commercial complex within such boundaries and to lease, assign, transfer or sublease space or facilities within the complex and to collect rates rentals, fees or charges for the use of property within the complex.

91. The boundaries of the Aloha Tower complex includes lands which are 5(f) Trust Lands.

92. The ATDC upon the advice of Defendant Hong takes the position that OHA will not be entitled to receive any part of the income, proceeds or funds derived by the ATDC from the development and operation of the Aloha Tower Project within the boundaries of the Aloha Tower complex notwithstanding that all or a part of the development will be on lands which are part of the 5(f) Trust.

93. OHA is entitled to a judgment in its favor determining that OHA is entitled to receive 20% of the income derived from the Aloha Tower development or a lesser proportion if less than all of the lands within the Aloha Tower complex boundaries are includable in the 5(f) Trust.

94. OHA is entitled to a judgment that the State is required to pay over to OHA its 20% pro rata share of all income and proceeds derived from the sale, lease or other disposition of lands included in the 5(f) Trust from and after Nov. 7, 1978 or in the alternative from and after June 7, 1979.

WHEREFORE, Plaintiffs pray that this Court after trial and determination of the claims for relief hereinabove alleged grant judgment in OHA's favor as follows:

1. As to Claim One that the Court declare that OHA is and has been entitled to receive 20% of the income and proceeds derived from the lands conveyed to the State under Public Law 88-233.
2. As to Claim Two that the Court declare that OHA is and has been entitled to receive its pro rata share of the income and proceeds from the 5(f) Trust from and after Nov. 7, 1978 or in the alternative from and after June 7, 1979.

3. As to Claim Three that the Court declare that OHA is and has been entitled to receive a 20% of all of the income and proceeds derived by DOT from sales, leases, licenses, user fees or other dispositions or uses of 5(f) trust lands for non-governmental purposes.

4. As to Claim Four that the Court declare that OHA is and has been entitled to receive 20% of all of the income and proceeds derived by DOT from sales, leases or other dispositions of 5(f) Trust Lands at Sand Island.

5. As to Claim Five that the Court declare that OHA is and has been entitled to receive 20% of the income and proceeds from the sale, lease or other disposition of lands at Sand Island which are under the control of the DLNR.

6. As to Claim Six: (a) that the Court declare that OHA is and has been entitled to receive a pro rata share of the income and proceeds derived by DOT from the operation of harbors throughout the state where all or a part of the harbor consists of lands which are part of the 5(f) trust; and, (b) that the Court determine the appropriate pro rata percentage applicable to each harbor.

7. As to Claim Seven that the Court declare that OHA is and has been entitled to receive at least 15.924% of the income and proceeds derived by DOT from the operation of Honolulu International Airport.

8. As to Claim Eight: (a) that the Court declare that OHA will be entitled to receive a pro rata share of the income and proceeds derived from the Aloha Tower Development Project; and, (b) that the Court determine what the appropriate pro rata percentage applicable to the Aloha Tower Development complex.

9. As to all claims, that the Court grant such other and further relief which the Court deems proper.

10. As to all claims, that OHA be granted its attorneys fees, costs of suit and such other and further relief as the Court deems just.

DATED: Honolulu, Hawaii, March 5, 1984.

/s/ Boyce R. Brown, Jr.
BOYCE R. BROWN, JR.

/s/ David C. Schutter
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APPENDIX C

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

	) CIVIL NO. 79260
THE TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS,	) MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS
Plaintiffs,	)
vs.	) Hearing Date: April 12, 1984 Time: 10:00 a.m. Judge: Edwin H. Honda
TANY S. HONG, in his official capacity as the Attorney General of the State of Hawaii, SUSUMO ONO, in his official capacity as Chairman of the Board of Land and Natural Resources, and JENSEN HEE, in his official capacity as Director of Finance,	) 1ST CIRCUIT COURT STATE OF HAWAII
Defendants.	) FILED 1984 MAR 15 P.M. 2:19
	) B. NAKAMAEJO CLERK

MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

The Defendants have moved for judgment on the pleadings pursuant to HRCP Rule 12(c) seeking dismissal of the complaint filed in this action by the Office of Hawaiian Affairs (OHA) against Tany Hong as Attorney General ("Hong"); Susumu Ono as Chairman of the Board of Land and Natural Resources ("Ono"); and Jensen Hee as Director of Finance ("Hee"), each of which Defendants were sued in their official capacities.

In a motion for judgment on the pleadings, just as in a motion for summary judgment:

> all well pleaded material allegations of the opposing party's pleading are to be taken as true *Moore's Federal Practice*, Vol 2A Para. 12, 15 p. 2343.

A motion for judgment on the pleadings can only be supported by *undisputed* facts (and, of course, facts of which the Court can take judicial notice). See, *Huntt v. Government of Virgin Islands*, 339 F2d 308 (3rd Cir. 1964); *First National Bank v. Conway Road Estates Co.*, 94 F2d 736 (8th Cir. 1938). For purposes of the State's motion for judgment on the pleadings all well pleaded material allegations contained in the complaint are to be taken as true. See, *Stanton v. Larsh*, 239 F2d 104 (5th Cir. 1957); *American Cardboard and Packaging Corp.*, 8FR Service 2d 12c.24, Case 1. (ED Pa. 1964); *Behrens v. Skelly*, 76 F Supp 75 (W.D.Pa. 1948), aff'd 173 F.2d 715, cert denied 338 U.S. 821 (1949); *Art Metal Constr. Co. v. Lehigh Structural Steel Co.*, 118 F2d 57 (3rd Cir. 1940); *Geist v. Prudential Ins. Co. of Am.*, 35 F.Supp. 790 (ED Pa. 1940).

I. HISTORICAL BACKGROUND OF THE CASE

In 1958, HC&D, Ltd. (HC&D) entered into an agreement with Molokai Ranch giving HC&D the right to mine sand at Papohaku Beach at west Molokai. HC&D agreed to pay Molokai Ranch a royalty of 50 cents for each cubic yard of sand taken from the beach. By June 30, 1973 the royalties paid to Molokai Ranch by HC&D totaled at least $1,279,006.00.

In late or early 1973 the State caught HC&D taking sand not from the land owned by Molokai Ranch (i.e., land mauka of the seaward boundary) but from the State-owned beach makai of the seaward boundary.

In 1973 the State sued HC&D and Molokai Ranch seeking to recover for the state-owned sand which HC&D had taken over the years. That suit is hereinafter referred to as the Molokai Sand Mining Case. The suit dragged on over the next nine years until it was finally settled in 1982.

In the meantime, in 1978 the voters ratified constitutional amendments (Art. XII, Sec. 5) which established the Office of Hawaiian Affairs. OHA is a body corporate and is a separate governmental entity which was specifically made independent of the executive branch (HRS Sec. 10-4). Article XII, Sec. 6 of the 1978 amendments to the State constitution also empowered the Office of Hawaiian Affairs ". . . to manage and administer the proceeds from the sale or *other disposition* of the . . . ***natural resources*** [*and*] *minerals* . . . including all income and proceeds from the *pro rata portion of the trust* referred to [in Article XII, Sec. 4 of the State Constitution], (emphasis added)

The "trust" referred to in Art. XII, Sec. 6 and in Article XII, Sec. 4 of the State constitution was established

by Section 5(f) of the Admissions Act (P.L. 86-3) as a public trust which consists of:

A. All ceded lands (i.e., lands ceded to the USA by the Republic of Hawaii when Hawaii became a territory), title to which was transferred back to Hawaii upon statehood pursuant to section 5(b) of the Admissions Act.

B. All ceded lands and territorial lands which were under the control of the USA at statehood but which were returned to Hawaii *before* August 21, 1964 pursuant to section 5(e) of the Admissions Act.

C. All ceded and territorial lands which were under the control of the USA at statehood but which were returned to Hawaii *after* August 21, 1964 pursuant to Public Law 88-233.

D. All proceeds from the sale or other disposition of the lands included in A, B, and C above.

E. All income derived from the lands included in A, B, and C above.

This trust is hereinafter referred to as the "5(f) Trust". The lands described in A, B, and C above are hereinafter referred to as the "5(f) Trust Lands".

As a result of Sec. 5(f) of the Admissions Act, when title to the 5(f) Trust Lands was transferred by the United States to the State of Hawaii, the lands were not transferred free and clear to the State of Hawaii. Instead they were transferred *in trust* to be used only for the purposes enumerated in Sec. 5(f). The terms of the trust (which

are spelled out in Section 5(f) of the Admissions Act) require that the 5(f) Trust Land as well as the proceeds and income derived by the State from the sale, lease or other disposition of 5(f) Trust Lands are to be held by the State of Hawaii as a public trust and used *only* for five specific purposes, one of which is "for the betterment of the conditions of native Hawaiians". Section 5(f) also provides that the use of the lands, proceeds and income "for any other object shall constitute a breach of trust for which suit may be brought by the United States."[1]

[Material Deleted in Printing]

VII. CONCLUSION

OHA was specifically constituted a body corporate with the right to sue or be sued. (HRS Sec. 10-16) Moreover OHA's entitlement to a share of the proceeds derived from ceded lands has been granted by both federal statute (the Admissions Act), and state statute (HRS Chapter 10) and by the State Constitution (Article XII).

If the State Constitution says OHA shall receive a pro rata share of ceded lands income and if HRS 10-16

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[1] The State in its motion for judgment on the pleadings suggests, by their reliance on *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n,* 588 F.2d 1216 (9th Cir. 1978), (1) that the complaint in this action was brought pursuant to Sec. 5(f) of the Admissions Act; and, therefore, (2) it should be dismissed because only the United States may sue to enforce a breach of the 5(f) trust. Unfortunately the State's argument is erroneously assumes that this action is based upon sec. 5(f) of the Admissions Act. Not so! This action is based upon the cited constitutional provisions and Chapter 10, HRS which provide a set of obligations and rights completely independent from those established by Sec. 5(f) of the Admissions Act.

provides that OHA, as a body corporate is specifically empowered to sue or be sued in its corporate name, then it necessarily follows that OHA can sue the State for the breach of the State's constitutional and statutory duty to transfer to OHA its pro rata share of ceded lands income. In this regard OHA is suing the State to secure a right guaranteed both by the constitution and by statute. In such cases sovereign immunity never applies.

OHA is within the zone of interest sought to be protected by these statutory and constitutional provisions and has a personal stake in compelling the state to adhere to those laws. It therefore has standing.

OHA seeks to vindicate an entitlement which arose *after* OHA was created. Therefore there is no retroactive application of a statute.

None of Defendants arguments have merit-indeed they are, or border on the frivolous!

Defendants motion for judgment on the pleadings should be denied.

Respectfully submitted,

/s/ Boyce R. Brown, Jr.
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Attorney for Plaintiffs

APPENDIX D

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

	) CIVIL NO. 81939
	)
	) MEMORANDUM
THE TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS,	) IN OPPOSITION) TO DEFENDANT'S) MOTION TO) DISMISS
Plaintiffs,	)
	) HEARING:) April 12, 1984) TIME: 10:00 a.m.
vs.	)
WAYNE J. YAMASAKI, individually and in his official capacity as the Director of the Department of Transportation of the State of Hawaii, et al.,	) JUDGE:) Edwin H. Honda)) 1ST CIRCUIT) COURT) STATE OF) HAWAII
Defendants.	)
	) FILED 1984) MAR 16 P.M. 4:07
	)) H. SETO) CLERK

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I

INTRODUCTION

On March 8, 1984 Plaintiffs, THE TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS, filed suit against WAYNE YAMASAKI, Director of the Department of Transportation of the State of Hawaii, the ALOHA TOWER DEVELOPMENT CORPORATION, SUSUMO ONO, Chairman of the Board of Land and Natural Resources, TANY HONG, Attorney General of the State of Hawaii, and JENSEN HEE, Director of Finance, State of Hawaii.

On March 9, 1984 Deputy Attorney General James Dannenberg filed a Motion to Consolidate the instant case with Civil No. 79260, *THE TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS (OHA) vs. TANY HONG, ET AL.* At the same time, Dannenberg also moved to dismiss the instant suit.

The gist of the State's argument in support of their Motion to Dismiss is that OHA is precluded from suit against the State, as the State has not waived its sovereign immunity, and that there is no private or public cause of action to enforce the State's trust duties imposed by the State constitution and/or Chapter 10, Hawaii Revised Statutes.

II

BACKGROUND

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The duties of the State officials are clear. It is also clear, that it is the refusal of the State officials to perform their constitutional and statutory mandates to give OHA its twenty percent (20%) of the income and proceeds derived from the 5(f) Trust Lands, that is the basis of this action. The precise issue presented is whether the State's refusal to give OHA its twenty percent (20%) of all income and proceeds derived from the sale or lease of those lands described in the Complaint, is in violation of Article 12, Sections 4, 5 and 6, and Article 16, Section 7 of the Hawaii State Constitution, and Sections 10-3(1), 10-4, 10-5(1) and 10-13.5 of the Hawaii Revised Statutes.

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Finally, the State has argued that Plaintiffs' claims are barred by stare decisis, citing the case of *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978).

In the *Keaukaha-Paneawa* case, native Hawaiian lessees brought suit seeking declaratory and injunctive relief from alleged violations of the Hawaiian Homes Commission Act and the Hawaii Admission Act. Although the Court found that Congress did not intend to create private cause of action via the Admission Act, the Court specifically noted that:

> Indeed, the rare references in the committee reports to enforcement of Section 5's trust provision [of the Admission Act] refer exclusively to the *public cause*

of action. See, e.g., S. Rep. No. 1164, 65th Cong., First Sess. 14 (1957).

It is clear, that although the *Keaukaha-Panaewa* case *may* be stare decisis on the issue of whether or not the Admission Act provides for a private cause of action, it certainly has no application in the instant case. OHA is a body corporate, and is "a separate entity independent of the executive branch". Section 10-4, H.R.S. OHA is an arm of the sovereign. The office may sue and be used in its own corporate name. H.R.S. § 10-16(a).

In analyzing whether or not the Plaintiff has a cause of action under the Admission Act, the Court applied the four part *Cort* test. (*Cort v. Ash*, 422 U.S. 66, 95 Ct. 2080, 45 L.Ed.2d 26 (1975).)

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . . - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concerns of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

588 F.2d at 1222.

In the instant case, each of the four prongs of the *Cort* test can be answered in the affirmative. First, by Constitutional mandate OHA was entitled to its pro rata share of the income and proceeds derived from the sale, disposition, or lease of the 5F trust lands. Second, as stated in *Keaukaha-Panaewa*, the Court found references

in the committee reports to the enforcement of Section 5F's trust provisions which refer exclusively to the public cause of action. Third, it is consistent with the underlying purposes of the legislative scheme to imply such remedy for the plaintiff. As can be clearly seen from the Admission Act, proceeds from the sale or other dispositions of the land and income therefrom shall be held by the State for one of the five enumerated purposes. The betterment of conditions for native Hawaiians was one such purpose. OHA was created "to address the needs of the aboriginal class of people of Hawaii." Section 10-1(a), H.R.S. Finally, as with the last test, the Court stated:

> We easily conclude that the cause of action at issue here is 'one traditionally relegated to state law, in an area basically the concern of [Hawaii] . . .' . . . With Hawaii's admission into the union, the national government virtually relinquished its control over and interest in the Hawaiian Home Lands. The problems described in plaintiff's complaint is essentially a matter of state concern. We deem it most appropriate for Hawaii's laws and judicial system to deal with it.

588 F.2d at 1224.

The *Cort* test was designed to determine whether implication of a private right of action was appropriate. Therefore, even assuming that the State terms this action as a "private" action, Plaintiffs have complied with the *Cort* test and accordingly, they maintain the instant action.

IV

CONCLUSION

Based on the above mentioned points and authorities, this court is respectfully urged to deny Defendants' Motion to Dismiss, and find that the Doctrine of Sovereign Immunity has no application in the instant case.

DATED: Honolulu, Hawaii, March 16, 1984.

/s/ JEREL D. FONSECA
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